

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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ST. CLAIR INTELLECTUAL : CIVIL ACTION
PROPERTY CONSULTANTS, INC., :
Plaintiff, :
vs. : NO. 09-354-LPS
TOSHIBA CORPORATION, TOSHIBA :
AMERICA INFORMATION SYSTEMS, : (Consolidated)
INC., and TOSHIBA AMERICA, :
INC., :
Defendants. : NO. 09-704-LPS

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Wilmington, Delaware
Friday, June 12, 2015
Pretrial Hearing

- - -

BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.
APPEARANCES:

BAYARD, P.A.
BY: RICHARD D. KIRK, ESQ.
STEPHEN B. BRAUERMAN, ESQ.
and
NIRO, HALLER & NIRO
BY: RAYMOND P. NIRO, ESQ., and
OLIVER D. YANG, ESQ.
ARTHUR A. GASEY, ESQ.
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(Chicago, Illinois)

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Inc.

Susan Marie Migatz
Registered Merit Reporter
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1 APPEARANCES: (Continued)

2 POTTER, ANDERSON & CORROON, LLP

3 BY: RICHARD L. HORWITZ, ESQUIRE

and

4 DICKSTEIN SHAPIRO, LLP

BY: JEFFREY K. SHERWOOD, ESQ., and

5 LESLIE L. JACOBS, JR., ESQ., and

CHARLES J. MONTERIO, JR., ESQ.

6 (Washington, District of Columbia)

7 Counsel on behalf of Toshiba

Corporation, Toshiba America

8 Information Systems, Inc., and Toshiba

America, Inc.

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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following
4 pretrial hearing was held in open court, beginning
5 at 11:00 a.m.)

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7 THE COURT: Good morning, counsel. We
8 have had some twists and turns here in the last 24
9 hours. I got the letter from Mr. Horwitz and then I
10 got Mr. Kirk's letter today.

11 So let me start by asking folks from
12 Toshiba -- and I don't know who is going to be
13 speaking on your behalf here -- where things stand.

14 MR. SHERWOOD: Good morning, Your
15 Honor. Jeff Sherwood for Toshiba.

16 As I read the letter that the Court
17 received this morning, the video theories 3 and 4,
18 which were the subject of our letter --

19 THE COURT: Are off the table.

20 MR. SHERWOOD: -- are off the table,
21 correct.

22 THE COURT: Right. And you're
23 satisfied with that and that prompts nothing further
24 from you; is that right?

25 MR. SHERWOOD: Not with respect to the

1 trial, Your Honor, that's correct. I'm not
2 satisfied that I spent a year worrying about video
3 theories that have been withdrawn, but that's not
4 something I'm saying anything about today.

5 THE COURT: All right. Good enough.

6 MR. SHERWOOD: So there was an audio
7 theory, too, that St. Clair previously withdrew.

8 THE COURT: Right. As I understand it,
9 we spent a little time digging back through old
10 motions. There were four theories. Two had been
11 withdrawn earlier. 3 and 4 were withdrawn this
12 morning. We're moving forward with Theory No. 1,
13 which is that there is a direct infringement claim
14 to be made based on the configuration of the
15 hardware within the laptop itself. Is that your
16 understanding, Mr. Sherwood?

17 MR. SHERWOOD: Yes, Your Honor, that is
18 my understanding. And if the Court pleases, at some
19 point -- I can do it now or later -- I would like to
20 comment on that Theory No. 1, just to at least alert
21 the Court as to how the evidence will go with
22 respect to that, because there is a similar issue;
23 not one that was the subject of any summary judgment
24 motion, but a similar issue.

25 THE COURT: What do you mean "a similar

1 issue"?

2 MR. SHERWOOD: Well, the claim, as the
3 Court knows from the letters, requires connections,
4 and we think there's a problem with proof with
5 respect to any connections even within the laptop.

6 THE COURT: Well, I'm sure you're not
7 making a motion for summary judgment on the Friday
8 before trial begins; right, Mr. Sherwood?

9 MR. SHERWOOD: That is correct, Your
10 Honor, that's correct.

11 THE COURT: Then you'll deal with your
12 concern about proof at an appropriate time during
13 the course of the trial should you have occasion to
14 do that; right?

15 MR. SHERWOOD: I will, Your Honor. I
16 just wanted to let the Court know if the Court was
17 interested, I could give a little preview, but I'm
18 happy to wait until the appropriate time.

19 THE COURT: Well, let's hear from
20 St. Clair, because they might be interested to hear
21 your issue, too.

22 MR. NIRO: Good morning, Your Honor.
23 We are interested in learning what the latest theory
24 is of noninfringement. But I think this does
25 simplify issues.

1 THE COURT: I just need you to identify
2 yourself for the record.

3 MR. NIRO: Oh, I'm sorry, Your Honor;
4 Ray Niro for the plaintiff, St. Clair.

5 THE COURT: Thank you.

6 MR. NIRO: With me today are some of
7 the other lawyers that are working on the case
8 perhaps you haven't met or seen. Oliver Yang, of
9 course, has been here. Art Gasey from our office
10 and Ashley LaValley from our office are also
11 attorneys with appearances in the case and they'll
12 be here for the trial.

13 THE COURT: All right. Thank you,
14 Mr. Niro.

15 Okay. Is there anything from your
16 perspective that's left open that we need to deal
17 with?

18 MR. NIRO: Well, I just want to make it
19 clear that we're taking these out not because we
20 believe there's a valid noninfringement theory but,
21 rather, because we deem it unnecessary. It adds a
22 small quantum of damage. It complicates the case to
23 be dealing with things outside the box, outside the
24 laptop. And, frankly, after considering their
25 position, it simply made sense to simplify this case

1 to one theory of infringement, and that has to do
2 with devices that are outside the processor,
3 external to the processor, but inside the computer
4 itself.

5 And I think that's something that in
6 the instruction, preliminary instruction, to the
7 jury, as we read it, there could be some ambiguity
8 about what "external" means because someone might
9 view "external" to mean external to the laptop
10 itself.

11 I'm glad to hear they're not going to
12 argue that as their noninfringement theory, but
13 that's important, to have that clarity, because the
14 patent itself shows and discusses a plurality of
15 individual devices, each of which is inside the
16 computer but outside the processor. So "external,"
17 as we view it, means exactly that, it can be outside
18 the computer, we've dropped that, or it can be
19 outside the processor but inside the computer.

20 THE COURT: Okay. And I've got your
21 proposed amended preliminary instruction in that
22 regard, which was attached to Mr. Kirk's letter of
23 today's date.

24 MR. NIRO: Correct, Your Honor.

25 THE COURT: All right. Thank you,

1 Mr. Niro.

2 MR. NIRO: Thank you.

3 THE COURT: Okay. Mr. Sherwood, I will
4 give the podium back to you. We're all interested
5 to hear what you have to say on that, and I'm also
6 interested to know whether you agree to the revised
7 proposed preliminary jury instruction.

8 MR. SHERWOOD: Taking the second item
9 first, Your Honor, we do agree.

10 THE COURT: Okay. Fine. Then you know
11 what I'm going to ask the parties to do? It may
12 sound like I'm being real lazy, but I'm just trying
13 to actually be real careful. I would like the
14 parties to submit to me a complete set of the
15 revised preliminary jury instructions that both
16 sides agree are accurate because that's what I'm
17 going to be reading from. Okay?

18 MR. NIRO: Yes, Your Honor.

19 THE COURT: And I'd love to get that
20 this afternoon.

21 Okay. Mr. Sherwood.

22 MR. SHERWOOD: Your Honor, I have a
23 couple of exhibits in a binder that I'd like to
24 offer the Court --

25 THE COURT: That's fine.

1 MR. SHERWOOD: -- that would help with
2 respect to what I'm going to say.

3 THE COURT: Sure.

4 Thanks. If you could just hand that to
5 the clerk right here and I'll have her hand it up to
6 me.

7 Thanks.

8 MR. SHERWOOD: Your Honor, I probably
9 should have put the patent in the binder, too, so I
10 apologize with respect to that. But let me just
11 start what I'm going to say by reading a phrasing
12 from the patent, which was the issue with respect to
13 the video. I'm not arguing video, but I just want
14 to draw the parallel between the issue that exists
15 with respect to the audio theory and the video.

16 THE COURT: This is going to be from
17 '163 Claim 1?

18 MR. SHERWOOD: Claim 1, yes, Your
19 Honor.

20 THE COURT: Okay. Hold on just a
21 second because I've got a copy of it, I just want to
22 get it in front of me.

23 MR. SHERWOOD: Sure.

24 THE COURT: Okay. Go ahead.

25 MR. SHERWOOD: So if we look at the

1 second limitation, which says "a plurality of
2 external bus devices...", the next word is
3 "...connected to the processor for communicating
4 with the processor at different times, said bus
5 devices operating with different timing parameters
6 that include different information transfer rates
7 associated with different bus bandwidths."

8 So what we know about this claim
9 limitation, Your Honor -- and this is my argument --
10 is that the processor has to be actually connected
11 to more than one external bus device. And we agree
12 it's just a bus device that's outside the processor,
13 not outside the laptop case; but, nonetheless, there
14 have to be connections to at least two bus devices.

15 That was a problem we had with respect
16 to their video theories. It's a problem that we
17 have with respect to their audio theories, too.
18 And, quite simply, what they need to prove is that
19 those connections exist within the laptops that
20 they've accused of infringement.

21 Now, their expert, Mr. Drake, has
22 admitted/testified that he has not examined any
23 Toshiba laptop. So he is not in a position, Your
24 Honor, to testify that there is such a connection
25 based upon the work that he's done in this case and

1 what's in his expert report.

2 And if the Court were to refer to Tab 5
3 here, I can quickly -- I've got a couple of pages of
4 his testimony that I can run through here, starting
5 at the bottom of Page 743, the last line on the
6 page:

7 "QUESTION: Now, a system that does not
8 include an on-board codec or modem that instead has
9 a video card would not infringe, would it?"

10 And there was a mistake, she meant to
11 say audio. So there's clarification.

12 And the answer is: "If it has nothing
13 connected to" -- and that should be HDA, high
14 definition audio -- "bus...it's not infringing."

15 Looking down a little farther, Line 15:
16 "Now, your report does not contain the information
17 identifying which out of the universe of products
18 sold by Dell and Acer and Lenovo and Gateway contain
19 that on-chip codec, does it?

20 "That's correct."

21 And he adds Toshiba on the next page,
22 Judge, just so you know. So that's correct.

23 "QUESTION: And so to -- to determine
24 which products were infringing and the extent of
25 infringement would require information outside the

1 scope of your report?

2 "ANSWER: Yes.

3 "QUESTION: And you don't intend to
4 offer opinions at trial as to the scope of
5 infringement under Theories 1 and 2 of the '163
6 patent?

7 "ANSWER: No, I don't expect to do
8 that."

9 They take a break, they come back, and
10 the question is clarified that Toshiba, Line 16, was
11 on that list as well, it doesn't change his answer;
12 which is to say that when we get to the question of
13 satisfying the claim limitation of "a plurality of
14 bus devices connected to the processor," their
15 technical expert does not have, by his own
16 admission, the evidence to make that connection.

17 Now, I'd like to point the Court also
18 to Tab 1. Tab 1 is the final infringement
19 contentions. And in particular I'd ask the Court to
20 look at Page 3 and on the left we can see the claim
21 limitation that I refer to, "a plurality of external
22 bus devices connected," and if we look over to the
23 right, we see a diagram, which is what they are
24 relying upon.

25 Your Honor, this is a diagram from

1 Intel, a high-level document. It's describing what
2 you could do with an Intel chip. It says nothing
3 about what connections, if any, were made with
4 respect to a Toshiba chip.

5 In fact, if you look a little farther
6 down, you can see that he's talking about things
7 that may be connected; not things that are
8 connected. So that's their infringement
9 contentions. You don't see anywhere in here, Your
10 Honor, this chipset in this Toshiba computer is
11 connected to this codec on the HD audio bus. It's
12 not there.

13 If you flip to Tab 2, Your Honor, which
14 is the claim chart attached to Mr. Drake's report,
15 and if we look at Page 2, we see exactly the same
16 thing.

17 And, in fact, the Court has already
18 looked at Mr. Drake's testimony and knows that
19 Mr. Drake has not identified or connected any codec
20 being connected to the processor in any Toshiba
21 computer.

22 So the question becomes: Well, what
23 other evidence do they have? What would be the best
24 thing that they can say with respect to a
25 connection?

1 And they have a theory that one
2 connection can actually be, in effect, two
3 connections; and giving them every benefit of the
4 doubt, I recognize that may be a jury issue, I
5 personally don't think it is, but I'm not here to
6 make that point today, Your Honor.

7 THE COURT: Good.

8 MR. SHERWOOD: So I'm only focused on
9 the question of whether there is one connection, not
10 whether there are two connections, because, as I
11 say, they do have a theory, it's in their expert
12 report, they can present it to the jury, and we'll
13 see what the jury thinks of it.

14 But with respect to the question of one
15 connection, we know it's not in Mr. Drake's report
16 and we know Mr. Drake cannot testify outside the
17 scope of his report.

18 THE COURT: Well, are you suggesting
19 that it's beyond a jury's fair capacity to infer
20 that there's some connection, that you don't have a
21 device that's unconnected? I mean --

22 MR. SHERWOOD: I'm suggesting there's
23 no evidence of the device being there and Mr. Drake,
24 if we look back at his --

25 THE COURT: If that's true, then I

1 really am wondering why we're here the Friday before
2 the Monday of trial, I'm confused, because it sounds
3 to me like you're saying without saying it: They
4 can't possibly win. There's no way for them to win.
5 As a matter of law, they have no evidence that will
6 meet this claim language. Am I mistaking what
7 you're telling me?

8 MR. SHERWOOD: No, Your Honor, you're
9 not.

10 THE COURT: Then can you just help me
11 with the timing of all of this?

12 MR. SHERWOOD: That's a little
13 difficult, Your Honor, to be quite candid about it.
14 And this may not be something the Court wants to
15 hear, but --

16 THE COURT: No. I absolutely want to
17 hear it.

18 MR. SHERWOOD: I'm going to give you my
19 unvarnished response to that, which is that at the
20 time that all this happened and all the decisions
21 were being made with respect to summary judgment
22 motions, it was a much larger group of defendants
23 involving a much larger group of issues and patents
24 and the joint defense made decisions about what
25 arguments to pursue. And so the judgment with

1 respect to Theories 3 and 4 was to pursue that
2 argument.

3 I am not moving for summary judgment,
4 Your Honor. I already said that once. I just want
5 to reiterate that. What I want the Court to
6 understand is the failure of proof and at the end of
7 their case we're, of course, going to move for a
8 directed verdict, and I don't want you to be
9 surprised.

10 THE COURT: Well, I'm certainly not
11 going to be surprised. But I don't want you to be
12 surprised either if you stand up and say don't let
13 this expert say X, Y, or Z because it's clearly
14 outside his or her report because you're just in a
15 difficult spot to be asking for the lines to be as
16 tight as it sounds like maybe you want them.

17 I mean, I'm going to wait and hear what
18 people say and I've got an obligation to keep
19 experts in bounds, but I think we are all aware that
20 language isn't a perfect and a precise thing. There
21 can be ambiguity in it. And in this context you're
22 just in a tough spot to be demanding that the lines
23 be drawn really, really, really narrowly when this
24 is coming up when it's coming up.

25 So you don't want me to be surprised.

1 I don't want you to be surprised. Okay?

2 MR. SHERWOOD: I understand that.

3 THE COURT: All right.

4 MR. SHERWOOD: I hope the Court doesn't
5 think I'm actually demanding anything. I just
6 wanted to tell the Court before the trial started
7 about this issue.

8 THE COURT: Right.

9 MR. SHERWOOD: That's all I'm doing.

10 THE COURT: And I'm glad for the
11 heads-up. I'm sure Mr. Niro is, too. You know, you
12 were good enough to give him a heads-up. I'll give
13 him a chance to give you a heads-up of what he might
14 have in the way of response so that you can both be
15 having something to think about and work on over the
16 weekend.

17 MR. SHERWOOD: Thank you, Your Honor.

18 THE COURT: Undoubtedly that's what
19 everybody was hoping to have.

20 Mr. Niro.

21 MR. NIRO: Well, the surprises never
22 end. This wasn't argued on summary judgment
23 obviously, as Your Honor quickly observed, and so we
24 heard about this now for the first time today.

25 Mr. Drake's report, which I reviewed in

1 some detail with Mr. Yang yesterday, goes through
2 about 40 pages of analysis on why on Theory 1 there
3 is infringement. Obviously as part of that there is
4 connection.

5 THE COURT: Well, when you say --

6 MR. NIRO: If there weren't connection,
7 the thing wouldn't even work.

8 THE COURT: When you say "obviously" --

9 MR. NIRO: We wouldn't have a workable
10 computer.

11 THE COURT: When you say "obviously,"
12 Mr. Niro, I am curious to hear your response to this
13 piece from the deposition.

14 MR. NIRO: Well --

15 THE COURT: On Page 744 the question
16 is: "And you don't intend to offer opinions at
17 trial as to the scope of infringement under Theories
18 1 and 2 of the '163 patent?

19 And on the top of Page 745 he says:
20 "No. I don't expect to do that."

21 MR. NIRO: I don't know what he was
22 talking about there because his report has 40-plus
23 pages of explanation as to why there's infringement
24 under Paragraph --

25 THE COURT: Under Theory 1.

1 MR. NIRO: -- or under Theory 1 and he
2 goes through in excruciating detail how the
3 connections between the processing and the way it
4 works -- and it's laid out in the patent as well --
5 you have a processor and then you have a series of
6 buses called special-purpose buses that are
7 connected to the processor, and then you have a
8 common bus that's connected to those special-purpose
9 buses, and then that connects to each of these
10 external devices that are within the computer.

11 One of those external devices --
12 actually, three of those external devices -- are
13 called codecs. Another is a modem. Those four have
14 been identified as the array of external devices
15 that are connected via those connections that we
16 just talked about; namely, an electrical connection
17 between the device, the common bus, and then the
18 special-purpose bus to the processor.

19 If there wasn't that electrical
20 connection, there was a disconnect there, these
21 devices wouldn't communicate with the processor and
22 you wouldn't have an operable computer.

23 THE COURT: Yes. So --

24 MR. NIRO: So he's ready to testify --

25 THE COURT: So their argument, as I

1 understand it, is you might have a connection, but
2 you don't have multiple connections; and in order
3 for this to work, you have to have a multiplicity of
4 devices connected to the common bus. And you don't
5 have Mr. Drake saying anything about that. All
6 you've got is an Intel document that says it could
7 happen and he never looked at a Toshiba device so
8 you've got no proof. You know, I'm sure
9 Mr. Sherwood --

10 MR. NIRO: That's what they're saying.

11 THE COURT: -- did a better job of
12 saying it than I did, but that's what I understand
13 him to be saying. Anything you want to say in
14 response to that?

15 MR. NIRO: Well, one, he did study and
16 analyze details of the Toshiba computer, including
17 all of the schematics. He did study --

18 THE COURT: Of the Toshiba computer.

19 MR. NIRO: And the Intel connections
20 that take place in terms of how that chip operates.

21 THE COURT: So --

22 MR. NIRO: So he's ready --

23 THE COURT: So when they say he never
24 looked at a Toshiba computer, your assertion is he
25 may not have looked at the actual physical device,

1 but he had Toshiba schematics and he knows what the
2 Toshiba schematics are to show that these computers,
3 these Toshiba-manufactured computers, have the
4 connections necessary, not in theory because Intel
5 said it, but because Toshiba's own schematics say
6 it, to satisfy that element or that piece of claim 1
7 in the '163 patent under your Theory 1 for
8 infringement. Have I understood you correctly?

9 MR. NIRO: You have, Your Honor.
10 That's exactly right.

11 THE COURT: All right.

12 MR. NIRO: And the connection, just to
13 make the point -- I think Your Honor has it, but --
14 the connection is an electrical connection. It's
15 like you don't have to have a physical connection.
16 It's an electrical connection through these various
17 lines that take place. Buses are the communication
18 devices that allow you to communicate data,
19 electronic signals, electrical signals, from one
20 point to another point.

21 THE COURT: And what do you think he's
22 going to be saying -- well, you know what? I don't
23 want to turn this into a mini-trial. We'll all be
24 together on Monday and we'll see what folks have to
25 say and we'll deal with the challenges.

1 So thanks very much, Mr. Niro.

2 MR. NIRO: Thank you, Your Honor.

3 THE COURT: Why don't I mention just a
4 couple of logistical points and then since we're all
5 gathered here, you know, if anybody else has got any
6 other issue we ought to be dealing with before we
7 gather on Monday morning, I'd appreciate a heads-up
8 about it and we can deal with it while we're here.

9 Here are the logistical things. We're
10 going to be in Chief Magistrate Judge Thyng's
11 courtroom on the second floor for this trial. She's
12 been kind enough to make that available to us.

13 The configuration of that courtroom and
14 the jury room is such that the jury room sits almost
15 immediately behind the courtroom. It's not like
16 some of the other courtrooms in the building where
17 the jury room is separated by a hallway and is down
18 away from the courtroom.

19 So to the extent we need to deal with
20 issues outside the hearing of the jury, it may be
21 necessary for us to just do it at a sidebar instead
22 of the way we would usually do it. It's just if
23 we're going to be talking about something that you
24 think is sensitive for the jury not to hear.

25 So I'll leave that in your camp. I'm

1 telling you this so that you know and so that if you
2 think you're going to be dealing with something
3 that's particularly sensitive, you can say and I
4 invite you to say, "I know we're in the courtroom
5 alone now, Your Honor, without the jury here, but
6 we'd ask to be at sidebar." And I'll be happy to
7 accommodate that and I think the court reporter will
8 be as well.

9 The other logistical point I wanted to
10 bring up was I had made a request for jury notebooks
11 to be prepared and I apologize to you for doing that
12 late in the game. It was a suggestion that came
13 from a judge that I've got a lot of respect for. I
14 hadn't considered it before. I do think it will
15 probably be helpful so I'm just asking whether
16 that's something you are able to work on.

17 MR. HORWITZ: We have worked on it,
18 Your Honor. There is one issue that I wanted to
19 raise with respect to the notebook, though --

20 THE COURT: Okay.

21 MR. HORWITZ: -- and that's just to get
22 your guidance.

23 I'm sorry; Rich Horwitz for Toshiba.

24 The one issue relates to the witness
25 pages with their pictures.

1 THE COURT: Yeah, just a picture.

2 MR. HORWITZ: What we have done in some
3 other cases, because things change during a trial,
4 just like they've changed in this one over the last
5 few days, is not to have all of them in at the
6 beginning because there might be a witness who, for
7 some reason, doesn't come and then the question is
8 why is this one there.

9 So we would prefer -- and we've done it
10 in other cases -- the day of or right before a
11 witness is going to be called, to hand it out to
12 them with the hole punches in it and they can just
13 put it in the notebook then so that we don't have
14 any questions about a missing witness. That's the
15 only thing.

16 THE COURT: Okay. I think that's a
17 perfectly legitimate request.

18 Mr. Kirk, have you got any problem with
19 that?

20 MR. KIRK: Mr. Niro will address it,
21 Your Honor.

22 THE COURT: All right.

23 MR. NIRO: Well, philosophically I
24 don't have a problem with it except it's a little
25 bit of hide the ball. We don't know who the

1 witnesses are going to be each day. We're going to
2 find out the day before.

3 We're ready to give you, Your Honor,
4 all of our witnesses in sequence. But if they don't
5 want to do that, I suppose it's up to you.

6 THE COURT: I'm not going to get into
7 that with you guys. You're required under my
8 Pretrial Order to give everybody a heads-up and I
9 expect everybody to be playing fair so there is no
10 hiding of the ball. I've set the parameters for
11 that and I trust everybody is going to be living by
12 that.

13 You know, I'm accepting the suggestion
14 from Toshiba on that. I don't want to be raising
15 questions if they drop a witness, for whatever
16 reason they may choose to drop a witness. So we'll
17 handle it that way. You keep your witness pages and
18 bring them in the day of and we'll hand them out.
19 And I'll explain to the jury, you know, about the
20 notebooks. Okay?

21 In fact, when you're working out these
22 final preliminary jury instructions, I invite you to
23 agree on language for me to explain this very
24 point -- okay? -- that: We're giving you notebooks.
25 This is for your convenience. This is not advocacy.

1 It's just to help you out. We'll be handing out
2 witness sheets on the day of the trial so that you
3 can keep track of who's been talking to you,
4 et cetera.

5 But I'll leave that to you. And I'm
6 sure, you know, with the number of lawyers we've got
7 here, that somebody can be spared to talk to the
8 other side about that and to come up with language
9 that's satisfactory to both sides and that will make
10 clear to the jury what we're trying to do to help
11 them out. Okay? Good?

12 MR. NIRO: That's fine, Your Honor.

13 THE COURT: I see heads nodding.

14 MR. NIRO: That's fine. We have
15 everything ready with all our witnesses, but you
16 would prefer we just do the ones we're going to call
17 each day?

18 THE COURT: Precisely.

19 MR. NIRO: Okay. We'll do that.

20 THE COURT: I think Toshiba has made a
21 reasonable request. I'm accepting it. That's the
22 way we'll proceed.

23 MR. NIRO: And we'll do the same thing.

24 THE COURT: Okay, good. That's great.

25 Thank you.

1 MR. HORWITZ: Your Honor, just one
2 other logistical point. I think everyone knows that
3 Monday is going to be a crazy day in this courthouse
4 and downstairs they said they think both doors are
5 going to be open in the morning. I just hope that
6 even with both doors open and everybody getting here
7 early, that everybody gets in early enough. But I
8 think it's going to be --

9 THE COURT: Well, I'm relying on you
10 folks to make sure you're here; right? Back in the
11 1970s, when the GSA was putting this building up, we
12 didn't have to deal with some of the security issues
13 that we have to deal with today and the problems
14 that arise from that. But we are where we are. It
15 is what it is. You guys have to plan to get
16 yourself here enough in advance and I'm counting on
17 folks doing that.

18 It's a smaller courtroom than this.
19 There isn't enough gallery space to bring in a lot
20 of extra things and have stacks of boxes in the back
21 the way you maybe do in some other courtrooms, or at
22 least I suggest you think hard about what you need
23 to bring, because there isn't the storage room in
24 the courtroom that you might be accustomed to when
25 you're in one of these courtrooms.

1 It's two or three benches -- maybe it's
2 only two -- three? -- three benches deep in the
3 gallery. The jury box is on my right instead of on
4 my left, the other way for you. And the box is
5 closer to the tables just because of the way things
6 are set up. So it's going to be a little bit more
7 of an intimate setting.

8 And in that vein I would ask people to
9 recognize the rule I've asked you to adhere to,
10 which is stay at the lectern, don't be wandering
11 around the courtroom. Some people want to be free
12 and easy and go all Matlock on me. I don't want you
13 doing that.

14 If you want to approach the witness,
15 ask for permission to approach the witness. If I
16 tell you you can freely approach, then you can go
17 back and forth without asking me again. But I don't
18 want the jury space to feel invaded. I'm kind of
19 protective of them that way. Okay?

20 Okay. Yes.

21 MR. NIRO: There was one other point,
22 Your Honor, and I don't mean to speak for Intel, but
23 we received a letter from an Intel lawyer, as did
24 they, the other side, requesting our cooperation --
25 of course, and we will do that -- in alerting him to

1 any confidential documents of Intel that might be
2 put before the Court and the jury.

3 We certainly will do that and I'm sure
4 they will as well. But he said something in the
5 letter suggesting that the courtroom be cleared and
6 so forth, and our response was that's something for
7 the Court to consider at the appropriate time.

8 But I wanted to alert the Court to the
9 fact that that issue may come up. It's not going to
10 come up in the first day because I don't envision
11 any Intel documents coming before the Court or the
12 jury then. But the second day it might happen.

13 THE COURT: All right.

14 Yes, Mr. Horwitz.

15 MR. HORWITZ: Thank you, Your Honor.
16 Just to respond to that, I'm here obviously today as
17 Toshiba's counsel. In the prior litigation, when it
18 was going, I was also Intel's counsel.

19 I'm not going to speak for Intel today
20 about the issue. We did get the communication. I
21 will note that just a few months ago, in the case
22 that Chief Judge Stark had, one of the Intellectual
23 Ventures cases, there was an issue with some Intel
24 confidential material and in that trial I was not
25 representing -- well, Intel was a third party and I

1 came to court and kind of did what this lawyer has
2 written to us about, and it was fully accommodated.
3 I think we just have to wait and see. But it did
4 not present a problem for Judge Stark in that case.

5 THE COURT: Well, it won't present a
6 problem for me either if there are no surprises.
7 You know what I mean?

8 MR. HORWITZ: Understood.

9 THE COURT: We're operating on the
10 no-surprise rule here and I expect the parties to
11 work -- and it sounds like you are -- in good faith
12 with Intel to see that their confidential
13 information is respected.

14 And in that vein, I fully expect that
15 both sides will work with Intel to make sure that
16 there is nothing of their confidential information
17 mentioned in open court that doesn't absolutely have
18 to be in order to make the case you need to make;
19 right? It may be that it's not an issue at all if
20 your witnesses are well instructed and careful and
21 if your examination is carefully thought out. And
22 if you have done that, then you'll know when
23 something is going to come up and you can tell Intel
24 and you can tell me. Okay?

25 MR. HORWITZ: Thank you, Your Honor.

1 THE COURT: All right. Thanks. Good.

2 Mr. Sherwood, anything else from you?

3 MR. SHERWOOD: No. I was going to say
4 what Mr. Niro said, Your Honor.

5 THE COURT: Okay, good. Thanks.

6 Mr. Niro, anything else from you, sir?

7 MR. NIRO: No, Your Honor. Thank you.

8 THE COURT: All right.

9 MR. NIRO: Oh, we may want to go down
10 to the second floor to view the courtroom. I assume
11 we can do that at some point.

12 MR. KIRK: It's supposed to be open
13 later this afternoon, but I can go down.

14 MR. BRAUERMAN: I'm sorry to interrupt,
15 Your Honor. Steve Brauerman. We are scheduled to
16 view the courtroom at 2 o'clock today, so that's
17 been taken care of.

18 THE COURT: Good. You're on that. It
19 sounds like your excellent local counsel are tuned
20 into that and are going to help you do what you need
21 to do with that, so very good.

22 Thanks, counsel. I appreciate people
23 coming in. I know it was short notice. But we had
24 a little excitement here at the end and it's taken
25 care of. Good. Thanks.

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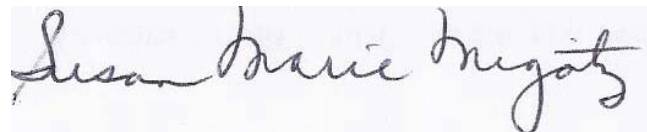
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C E R T I F I C A T E
- - -

I do hereby certify that I am a Notary Public in good standing; that the aforesaid proceeding was taken before me, pursuant to notice, at the time and placed indicated; that the proceeding was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the transcript is a true and correct record of said proceeding; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this
12th day of June 2015.



Notary Public

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